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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 654

AETNA CASUALTY & SURETY CO.

and

McCLOSKEY ENTERPRISES, INC., *Petitioners,*

v.

MADGE VINSON, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Petition	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting This Writ	4
Argument	5
Conclusion	12

AUTHORITIES CITED

CASES:

Crowell v. Benson, 285 U.S. 22 5
Del Vecchio v. Bowers, 296 U.S. 280 ..... 6, 7
Cardillo v. Liberty Mutual, 330 U.S. 469 ..... 6, 7
Vendemia v. Cristaldi, 221 F. 2d 103 6
O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 ..... 6, 7, 12
Voris v. Eikel, 346 U.S. 328 6
U. S. Fidelity & Guaranty Co. v. Britton, 88 U.S. App. D.C. 293, 188 F. 2d 674 8
General Accident Fire & Life Assurance Corp. v. Britton, 100 U.S. App. D.C. 236, 243 F. 2d 659 8
Gooding v. Willard, 209 F. 2d 913 ..... 10, 11
Kwasizur v. Cardillo, 175 F. 2d 235 ..... 10, 11

STATUTES AND RULES

28 U.S.C. 1254 (1) 2
Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) 3, 5
Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, et seq. 5

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PETITION

The petitioners, Aetna Casualty & Surety Co., and McCloskey Enterprises, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on June 14, 1962.

OPINIONS BELOW

The United States District Court for the District of Columbia Circuit did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit has not been reported as yet, but is set forth in full and attached hereto as "Appendix A."

JURISDICTION

The judgment of the Court of Appeals was entered in the above-entitled cause of action on June 14, 1962. The jurisdiction of this Court is invoked by reason of Title 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

The questions present for review are:

1. Is a reviewing court bound by the findings of fact of a Deputy Commissioner if said findings are supported by substantial evidence considering the record as a whole.

2. Does a reviewing court have the power to make its own findings of fact de novo.

STATUTE INVOLVED

Sections 919 and 921 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C., Sections 919 and 921) provide in pertinent parts as follows:

> SEC. 919. Procedure in Respect of Claims
>
> (c) The Deputy Commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a

hearing thereon. If a hearing on such claim is ordered the Deputy Commissioner shall . . . after hearing is had, by order, reject the claim or make an award in respect of the claim. . . .

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and . . .

SEC. 921. Review of Compensation Order

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the Deputy Commissioner making the order and instituted in the Federal district court for the judicial district in which the injury occurred. . . .

STATEMENT OF THE CASE

This cause arose upon a complaint to the United States District Court for the District of Columbia Circuit to review and set aside as not in accordance with law a compensation order filed on December 14, 1960, by Charles Einbinder, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, in which order the Deputy Commissioner rejected the claim for compensation (death benefits) filed by the respondents. The Deputy Commissioner rejected such claim for the reason that the death of Henry A. Vinson (employee) did not result from an injury which arose out of and in the course of his employment.

The said order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 United States Code, Sections 901 et seq., as made

applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, District of Columbia Code 36-501.

The United States District Court for the District of Columbia Circuit, upon a review of the record, granted the Deputy Commissioner's and the petitioners motion for summary judgment and dismissed the complaint without opinion.

Thereafter an appeal was filed by the respondents to the United States Court of Appeals for the District of Columbia Circuit. A division of that court consisting of three judges reversed the decision of the District Court.

The petitioners thereupon filed a petition for rehearing by the United States Court of Appeals for the District of Columbia Circuit sitting en banc. On September 12, 1962, by order of that Court said petition was denied. Four judges of that Court voted to grant the petition for rehearing en banc.

REASONS FOR GRANTING THIS WRIT

The issues involved in this case are of great public importance because they are determinative of substantial rights of parties to a great bulk of litigation in the District of Columbia and elsewhere in the United States. A great deal of confusion and uncertainty has arisen because of the tenor of the decision of the Court in this case. The Court seemingly invades the province of the fact-finding function of the Deputy Commissioner. The action of the appellate court in this case is arbitrary and unreasonable in the light of previous expressions of this Court in similar cases. The Supreme Court of the United States has on occasions too numerous to enumerate clearly enunciated

the limited function of the reviewing courts regarding the findings of fact of an administrative officer. It is submitted by the petitioners herein that the action of the Appellate Court in the instant case represents a flagrant invasion of the fact-finding function of the administrative officer to whom Congress has delegated this authority. *Administrative Procedures Act,* 60 Stat. 237, 5 U.S.C. 1001, et seq.

ARGUMENT

The action of the U. S. Court of Appeals for the District of Columbia Circuit represents a serious invasion of the functions of an administrative body which was established by Congress for the specific purpose of acting as a fact-finding body. The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C., Sec. 901, et seq., as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D. C. Code 36-501, contains and sets forth the duties of Deputy Commissioners with respect to claims filed under said Act. The Supreme Court in *Crowell* v. *Benson,* 285 U.S. 22, said in construing this act: ". . . there can be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the act, the findings of the Deputy Commissioner, supported by evidence and within the scope of his authority shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."

There have been many decisions of the Supreme Court since that time which have explained and interpreted the respective functions of the Deputy Commissioner and the reviewing Court in these cases. As stated by the Supreme Court in *Del Vecchio* v. *Bowers*, reported at 296 U. S. 280: ". . . the issue must be resolved upon the whole body of proof pro and con; and if it permits an inference either way . . ., the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the Court." "If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing Court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the Court because of a belief that the one chosen by the Deputy Commissioner is factually questionable." See *Cardillo* v. *Liberty Mutual*, 330 U. S. 469. The United States Court of Appeals for the District of Columbia Circuit has even gone so far as to say that "The Deputy Commissioner is not required to disclose his reasoning process in reaching a conclusion. . . ." See *Vendemia* v. *Cristaldi*, 221 F. 2d 103. It is clear then that the United States Court of Appeals for the District of Columbia Circuit is limited in its review in the instant case to a determination of whether the Deputy Commissioner's findings are supported by substantial evidence upon the record considered as a whole. The findings of fact of the Deputy Commissioner are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504; *Voris* v. *Eikel*, 346 U. S. 328. Even if the

evidence permits conflicting inferences, the inference drawn by the Deputy Commissioner is not subject to review and will not be reweighed. *Del Vecchio* v. *Bowers*, 296 U. S. 280; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469. The scope of judicial review is as stated by this Court in *O'Leary* v. *Brown-Pacific Maxon*, supra:

> "... The standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 71 S. Ct. 456. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole ...
>
> "... We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. ..."

Similarly with reference to the inferences drawn by a Deputy Commissioner, the Supreme Court in *Cardillo* v. *Liberty Mutual Ins. Co.*, supra, said:

> "In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one

is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable.

". . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court."

Under such interpretations of the Longshoremen's Act by the Supreme Court of the United States and the Court of Appeals for the District of Columbia (*U. S. Fidelity & Guaranty Co.* v. *Britton*, 88 U. S. App. D. C. 293, 188 F. 2d 674; *General Accident Fire & Life Assurance Corp.* v. *Britton*, 103 U. S. App. D. C. 135, 255 F. 2d 544; *Liberty Mutual Ins. Co.* v. *Britton*, 100 U. S. App. D. C. 236, 243 F. 2d 659), a court may not set aside a compensation order unless, on the whole record, the Deputy Commissioner was "compelled" to make findings, draw inferences and arrive at conclusions different from those set forth in the compensation order complained of.

It is respectfully submitted by the petitioners that the action of the U. S. Court of Appeals for the District of Columbia Circuit in the instant case represents a flagrant invasion of the fact finding function of an administrative body. While it payed lip service to its limited function the Court proceeded to review the facts de novo and then in total disregared of all of the facts on record it proceeded to highlight only those facts which it considered favorable to the appellants' cause. The reviewing Court even substituted its own recollection of some personal unrelated steering dif-

ficulty with an automobile without power steering for specific evidence in the record concerning the amount of force required to steer the vehicle which plays an important part in this case. The employer produced moving pictures in the trial of this case in order to demonstrate the force required to steer this vehicle. Your petitioners made a proffer to show these motion pictures to the reviewing Court if the Court deemed it necessary. The movies showing the operation of this vehicle and the testimony of George P. Diederick, Jr., a crane operator for 20 years, who testified among other things (T. 118) ". . . that the rig drives more or less like a big truck and does not require any extraordinary strength to operate" seems to have been completely ignored by the reviewing Court. Likewise this man's statement that he saw the employee from time to time operating said rig and never noticed him having any trouble driving it (T. 128) or that he saw the employee whom he knew very well driving the rig and he never complained about it being too hard to drive (T. 120, 128-129) as well as the testimony of Howard F. Massey, general superintendent of the employer, who had been in construction business for 35 years and who was well acquainted with the type of vehicle under discussion, that the rig the employee had been driving was no more difficult to manage than any other manually steered truck (T. 141-144), or his comments regarding the rig in question while viewing the moving pictures showing the facility with which the rig could be steered, was with the same ease discarded by the Court in arriving at its conclusion concerning the facts. It is apparent that the Deputy Commissioner had ample evidence upon which to base his findings of fact. We are, of course, completely in the dark as to his reasoning process. It was solely

within the province of the Deputy Commissioner, as the trier of the facts, to determine the credibility of witnesses; he could disbelieve any part or all of the evidence presented according to his judgment of its truthfulness and reliability. *Kwasizur* v. *Cardillo*, 175 F. 2d 235; *Gooding* v. *Willard*, 209 F. 2d 913. We can only surmise that the Deputy Commissioner did not feel that the testimony of the witnesses presented by the employee was worthy of belief. It was within his province and his alone to determine which witnesses to believe and which not to believe. It may be significant that there is not one word of testimony to the effect that the decedent complained to any other employee that the work of steering the vehicle in question was too difficult for him on the day of his death.

The U. S. Court of Appeals for the District of Columbia Circuit seems to lay great stress upon the fact that the employee was "maneuvering and backing into a very tight and difficult spot" when he died. There was no such finding by the Deputy Commissioner who heard the testimony and saw the witnesses in person and who reviewed the entire record prior to issuing his decision. There is absolutely no evidence in the record of testimony taken before the Deputy Commissioner in this case that the employee was engaged in any activity when he died. The testimony is that the employee was found dead in the cab of the rig while it was standing still. This is one of the esssential weaknesses in the employee's case. There was no proof of injury.

It should be noted that judicial review of a rejection of a claim involves a somewhat different viewing of the evidence from review of an award of compensation. In the latter case there must be affirmative evidence in the record to support the award; in the former,

affirmative evidence is not needed to support the denial of compensation, since, upon failure of a claimant to carry the burden of proof in support of his claim, the claim must be rejected notwithstanding the absence of affirmative evidence to disprove the claim. In other words, it is not necessary for the employer to prove a negative, *Gooding* v. *Willard*, 209 F. 2d 913; *Kwasizur* v. *Cardillo*, 175 F. 2d 235. The rejection follows the claimant's failure to establish his claim. In the Gooding case, the Court of Appeals said:

> "We might let decision turn on the above, but it should also be noted that the burden to show that the accident was a contributing cause of the death was on the appellee. It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged. The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence, it was at least an expression of the determination of the Commissioner that the evidence was short to show affirmatively a causal connection between the accident and the death. It is abundantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision, it was error to set it aside."

In view of the evidence presented in contradiction to the plaintiff's claim that the employee's death not only arose in the course of but also out of the employment, as outlined earlier herein, it would seem that the Deputy Commissioner's rejection of the claim was

supported by substantial evidence in the record as a whole. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504.

If the decision of the United States Court of Appeals for the District of Columbia Circuit in this case is allowed to stand, it is respectfully submitted by the petitioners herein that the fact-finding powers of the Deputy Commissioner have been rendered nugatory. His function and office would be completely emasculated.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit were mailed, postage prepaid, this 11th day of December, 1962, to the office of David Acheson, Esq., United States Attorney, United States Court House, Washington, D. C., Herbert Miller, Esq., Assistant Solicitor of Labor, U. S. Department of Labor, Washington, D. C., and to Martin E. Gerel, Esq., 925-15th Street, N.W., Washington, D. C., attorney for respondents.

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